



**In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth**

No. 02-21-00277-CV

KENT SCRIBNER AND FORT WORTH INDEPENDENT SCHOOL DISTRICT,
Appellants

V.

JENNIFER TREGER, FOR HERSELF AND AS NEXT FRIEND OF M.T. AND
T.T.; TODD DANIEL, FOR HIMSELF AND AS NEXT FRIEND OF HIS MINOR
CHILDREN; JANE DOE, FOR HERSELF AND AS NEXT FRIEND OF HER
MINOR CHILDREN; KERRI REHMEYER, FOR HERSELF AND AS NEXT
FRIEND OF HER MINOR CHILDREN; AND JASON SMITH, INDIVIDUALLY
AND AS NEXT FRIEND OF S.S., Appellees

On Appeal from the 141st District Court
Tarrant County, Texas
Trial Court No. 141-327449-21

ORDER

Introduction

Granting relief requested by parents of students attending the Fort Worth Independent School District, the trial court below entered a temporary injunction

order restraining the District¹ from denying students and parents access to District facilities “based on a face covering.” The District’s filing of a notice of appeal of the injunction order automatically suspended the order’s effect. The parents bringing the suit have filed a motion seeking an order from this court to restore and impose the restraints in the injunction order during the pendency of the District’s appeal. We grant the motion.

Factual and Procedural Background

Four parents who have children attending the Fort Worth Independent School District filed suit against the District.² The parents’ suit sought an injunction to prohibit the District from adopting a requirement for face coverings that contravened the Governor’s Executive Order GA-38, which mandates that “[n]o governmental entity, including a county, city, school district, and public health authority, and no government official may require any person to wear a face covering or to mandate that another person wear a face covering.” *See* Governor of the State of Tex., Executive Order GA-38, at 4 (July 29, 2021), available at https://gov.texas.gov/uploads/files/press/EO-GA-38_continued_response_to_the_COVID-19_disaster_IMAGE_07-29-2021.pdf (last visited Sept. 13, 2021).

¹The Fort Worth Independent School District’s superintendent is also a defendant in this matter. We refer to the Fort Worth Independent School District and its superintendent collectively as the District.

²A fifth parent intervened.

The trial court entered a temporary restraining order that imposed the restraints sought by the parents and then extended the restraining order. The trial court then determined whether to grant a temporary injunction based on evidence presented at a hearing as well as the submissions of the parties.

On September 3, 2021, the trial court signed an injunction order. That order made the following findings:

The Court FINDS that the Defendants' face-covering rule as described by Plaintiffs was made without authority and is contrary to and in violation of Gov. Abbott's Executive Order GA-38.

The Court further FINDS that, unless enjoined, Plaintiffs face irreparable harm, including significant and irreparable damage to their right to a healthful environment while they receive a free and appropriate public education free of activity sanctioned by the Fort Worth Independent School District which Gov. Abbott's Executive Order GA-38 specifically prohibits.

Additionally, the Court FINDS immediate injunctive intervention is appropriate to prevent further harm and preserve the status quo before the Court can hear and adjudicate the Plaintiff[s'] claims in the present suit. Recently, the Texas Supreme Court in response to a petition for mandamus in Cause No. 21-0720 has prevented the Bexar County District Court from enjoining enforcement of GA-38, stating:

[T]his case, and others like it, are not about whether people should wear masks or whether the government should make them do it. Rather, these cases ask courts to determine which government officials have the legal authority to decide what the government's position on such questions will be. The status quo, for many months, has been gubernatorial oversight of such decisions at both the state and local levels. That status quo should remain in place while the court of appeals, and potentially this Court, examine the parties' merits arguments to determine

whether plaintiffs have demonstrated a probable right to the relief sought.[]

Based on those findings, the injunction order imposed the following restraints on the District:

NOW, THEREFORE, good cause appearing, the Court GRANTS the application, and ORDERS Defendant Scribner and the Fort Worth Independent School District (“Defendant”) and its agents to cease enforcement actions of the face-covering rule described in the Application, pending the adjudication of Plaintiff[]s[] claims in the present case, as follows:

Defendant shall not deny any student or parent access to Fort Worth Independent School District facilities based on a face covering, nor act in derogation of any right enjoyed by a person wearing a face covering.

Further, Defendant shall inform its employees of this Temporary Injunction and its contents, giving them notice that violations of this Temporary Injunction are sanctionable.

The injunction order set a trial on the merits for January 17, 2022.

Three hours after the trial court signed its injunction order, the District filed a notice of appeal. The notice stated in part that “[t]he trial court’s temporary injunction order is automatically suspended because Defendants are entitled to supersede the order without security by filing this notice of appeal. Tex. R. App. P. 29.1(b); Tex. Civ. Prac. & Rem. Code [Ann.] § 6.004.”

The parents do not challenge the position taken in the District’s notice of appeal that the provisions the notice recites suspend the restraints contained in the injunction order. Instead, the parents have filed Appellees’ Emergency Motion for

Temporary Relief Pending Determination of Appeal. In essence, the parents’ motion seeks to have this court re-impose the restraints imposed by the trial court’s injunction order during the pendency of the District’s appeal.

Analysis

This court has the power to grant the relief requested by the parents.

Our first question is whether this court possesses the power to grant the parents the relief that they seek. We do.

Texas Rule of Civil Procedure 29.3 empowers us to make temporary orders during the pendency of an appeal from an interlocutory order—such as the trial court’s injunctive order—as follows: “When an appeal from an interlocutory order is perfected, the appellate court may make any temporary orders necessary to preserve the parties’ rights until disposition of the appeal and may require appropriate security.” Tex. R. App. P. 29.3. This rule invests us with the inherent authority to issue an order preserving the parties’ rights while we review the merits of an interlocutory appeal. *Tex. Educ. Agency v. Hous. Indep. Sch. Dist.*, 609 S.W.3d 569, 577 (Tex. App.—Austin 2020, order [mand. denied]) (per curiam); *see also In re Geomet Recycling LLC*, 578 S.W.3d 82, 89 (Tex. 2019) (orig. proceeding) (“Rule 29.3 expressly contemplates that . . . relief [protecting a party from irreparable harm during the pendency of an appeal of an interlocutory order] is directly available in the court of appeals[,]” and “[i]t authorizes the court of appeals, during an interlocutory appeal, to

‘make any temporary orders necessary to preserve the parties’ rights until disposition of the appeal.’”).

The inherent authority granted to us in Rule 29.3 empowers us to make temporary orders to preserve the parties’ rights even when the injunction order has been suspended by a state governmental entity’s filing of a notice of appeal.³ And even further, this year, the Texas Supreme Court held that Rule 29.3 vests us with the inherent authority to make temporary orders that have the effect of contravening the suspended operation of an interlocutory order. *See In re Tex. Educ. Agency*, 619 S.W.3d 679, 683 (Tex. 2021) (orig. proceeding).

This court will grant the relief requested by the parents.

Having concluded that we have the power to grant the parents the relief that they seek, the question becomes whether we should exercise that power to grant the temporary relief that they seek. The Texas Supreme Court has made it clear that the Governor’s authority to make face-covering decisions is the status quo that should be preserved during the pendency of the various legal controversies over whether the Governor or local government entities hold that power. Our failure to restore the effect of the trial court’s injunctive order would alter that status quo. Thus, as we

³Texas Rule of Civil Procedure 29.1(b) provides, “Perfecting an appeal from an order granting interlocutory relief does not suspend the order appealed from unless: . . . the appellant is entitled to supersede the order without security by filing a notice of appeal.” Tex. R. App. P. 29.1(b). Section 6.004 of the Civil Practice and Remedies Code provides that “[a] school district may institute and prosecute suits without giving security for cost and may appeal from judgment without giving supersedeas or cost bond.” Tex. Civ. Prac. & Rem. Code Ann. § 6.004.

explain below, we order that the trial court's injunction order will remain in effect during the pendency of the District's interlocutory appeal.

Specifically, "Rule 29.3 gives an appellate court great flexibility in preserving the status quo based on the unique facts and circumstances presented." *Geomet Recycling*, 578 S.W.3d at 89. On three recent occasions, the Texas Supreme Court has stated its view of what the status quo is in disputes between local governments and the Governor over face coverings. *In re Greg Abbott*, No. 21-0720 (Tex. Aug. 26, 2021) (order); *In re Greg Abbott*, No. 21-0686 (Tex. Aug. 15, 2021) (order); *In re Greg Abbott*, No. 21-0687 (Tex. Aug. 15, 2021) (order). The injunction order in this case quotes the supreme court's view, but it bears repeating:

As we previously held in staying the trial court's temporary restraining order in the underlying case, the court of appeals' order alters the status quo preceding this controversy, and its effect is therefore stayed pending that court's decision on the merits of the appeal. *See In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004) [(orig. proceeding)]. This case, and others like it, are not about whether people should wear masks or whether the government should make them do it. Rather, these cases ask courts to determine which government officials have the legal authority to decide what the government's position on such questions will be. The status quo, for many months, has been gubernatorial oversight of such decisions at both the state and local levels. That status quo should remain in place while the court of appeals, and potentially this Court, examine the parties' merits arguments to determine whether plaintiffs have demonstrated a probable right to the relief sought.

Greg Abbott, No. 21-0720.

It appears that the supreme court's view, then, is that in the clash between the Governor's exercise of his powers and those of the District regarding face coverings,

the status quo is the primacy of the Governor’s powers to make decisions about face coverings. Thus, to deny the parents’ motion and to permit the trial court’s injunctive order to remain suspended would “[i]nstead of preserving the status quo, . . . have the contradictory effect of permitting the status quo to be altered.” *Tex. Educ. Agency*, 619 S.W.3d at 683–84 (explaining that such a result defeats the very purpose of supersedeas, which is to preserve the status quo).

The relief that we grant

In light of the supreme court’s view of what the status quo is when there are conflicts between the Governor and the local governmental entities over face masks and the effect that not granting relief will have on upsetting the status quo, we grant the parents’ Emergency Motion for Temporary Relief Pending Determination of Appeal. *See* Tex. R. App. P. 29.3. Thus, we reinstate the trial court’s temporary injunction order pending disposition of the District’s accelerated appeal. *See Hous. Indep. Sch. Dist.*, 609 S.W.3d at 577 (granting a Rule 29.3 motion and ordering the trial court’s temporary injunction order to remain in effect until the disposition of the appeal).

We direct the clerk of this court to send a notice of this order to the trial court judge, the trial court clerk, and the attorneys of record.

Dated September 13, 2021.

Per Curiam